Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

OCTOBER TERM, 2003

WILLIAM P. SCHLENK,

Petitioner,

v.

FORD MOTOR CREDIT CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit departed from this Court's clear precedents by failing to accord any deference to the Federal Reserve Board's controlling interpretation of its own administrative rules implementing the Truth in Lending Act?

2. Whether the Sixth Circuit misinterpreted and misapplied the provisions of the Truth in Lending Act, by holding that the statute and its governing administrative rules do not prohibit respondent from stating on every automobile lease that it does not charge an acquisition fee, when in fact respondent has been charging millions of consumers one of the highest acquisition fees in the marketplace, costing them hundreds of dollars per lease?

PARTIES TO THE PROCEEDING

The petitioner, William P. Schlenk, is the plaintiff in this case and was the appellant in the court below. Petitioner is an individual, and so there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

Ford Motor Credit Corporation is the defendant in this case and was the appellee in the court below.

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INTRODUCTION

Petitioner William P. Schlenk respectfully requests that the Court issue a writ of *certiorari* to review the judgment entered by the United States Court of Appeals for the Sixth Circuit in this proceeding. The petition presents issues of exceptional importance under the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, ("TILA") as subsequently amended by the Consumer Leasing Act, 15 U.S.C. § 1667 *et seq.* The decision below raises serious questions about the fidelity with which the lower courts are adhering to this Court's treatment of the proper deference to be given to expert agency interpretation of its own administrative rules — in this case, with respect to the Federal Reserve Board. It also raises serious questions about the lower courts' fidelity to Congress in interpreting and applying both the text and the core purposes of the TILA. The resolution of those statutory and regulatory issues will greatly influence the disclosures and other terms contained in millions of consumer automobile leases executed every year. The direct economic impact of this case on consumers is thus enormous, affecting transactions worth billions of dollars every year — to say nothing of the broader impact of a decision here on the amounts and kinds of information that will be disclosed to consumers in other leasing transactions.

In its decision, the court below held that the implementing regulation under the TILA, which is the Federal Reserve Board's Regulation M, allows respondent Ford Motor Credit Company to itemize the acquisition fee as part of the gross capitalized cost on its lease forms, represent to consumer lessees that it is not charging such a fee, and then conceal it within the rent charge (which does not have to be itemized).[1] In so

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[1] The "acquisition fee" is an amount that the lessor charges to the lessee for costs associated with acquiring and administering the terms of the lease, which is thus "a type of handling fee." *See* Pet. App. 2a. The courts and the parties sometimes denote this amount as "lease acquisition charges" or as an "administrative fee." These occasional differences in terminology have no bearing on the actual fees exacted from consumers or the substance of the underlying leasing transaction.

holding, the court ignored the agency's own explanation and interpretation of the TILA and its own implementing regulation, and thus failed to afford proper deference to the agency under this Court's consistent holdings in a long line of cases. *See, e.g.*, *Auer v. Robbins*, 519 U.S. 452 (1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994); *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981); *Ford Motor Co. v. Milhollin*, 444 U.S. 555 (1980). The same issue of the proper deference to be given to the Board under the TILA is pending before the Court in *Household Credit Serv., Inc. v. Pfennig*, U.S. No. 02-857 (cert. granted June 27, 2003).

In addition, the court misconstrued the central objectives and provisions of the TILA, which are expressly designed to protect the public against misleading and deceptive practices, including attempts to conceal or misstate information that is material to the economic decisions made by individual consumers. Here again the court below failed to afford the proper deference due to the agency under this Court's cases such as *Chevron U.S.A., Inc. v. Natural Resources Defense Ccl., Inc.*, 467 U.S. 837 (1984), *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Milhollin*. By holding that the TILA gives lessors the discretion to fold fees into the rent charge when those fees are supposed to be itemized and disclosed as part of the gross capitalized cost, the court effectively neutered the central remedial purpose of the statute — here, in particular, to ensure that consumers will be able to make more informed leasing decisions based on complete and accurate pricing information that permits direct comparisons among all the pricing components embedded in different leases.

These misapplications of the statutes and governing agency regulations justify the Court's consideration on plenary review. Moreover, the lower courts are divided on the statutory and regulatory issues that are squarely presented in this case. Unlike the Sixth Circuit here, the other circuits have faithfully honored this Court's express teaching in *Milhollin* that in the realm of consumer protection under the TILA, "[u]nless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive." 444 U.S. at 565; *see*

also Valencia, 452 U.S. at 219 (same). In addition, other circuits have typically made deliberate efforts to interpret the TILA to effectuate its clear remedial purposes, which the court below failed to do.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, which is reported as *Schlenk v. Ford Motor Credit Corp.*, 308 F.3d 619 (6th Cir. 2002), is reprinted in the Appendix to this petition ("Pet. App.") at 1a-6a. The Sixth Circuit's opinion affirmed an order and opinion of the United States District Court for the Western District of Kentucky, which is the last of a series of unreported rulings that are reprinted at Pet. App. 7a-18a. The Sixth Circuit denied a timely petition for rehearing and suggestion of rehearing *en banc*. *See id.* at 19a.

STATEMENT OF JURISDICTION

The Court of Appeals for the Sixth Circuit denied rehearing and rehearing *en banc* on February 11, 2003. Pet. App. 19a. The Court granted a timely request for extension of the time within which to file a petition for certiorari, which was extended to and including July 11, 2003. *See id.* at 21a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Truth in Lending Act provides in relevant part:

§ 1667a. Consumer Lease Disclosures

> Each lessor shall give a lessee prior to the consummation of the lease a dated written statement on which the lessor and lessee are identified setting out accurately and in a clear and conspicuous manner the following information with respect to that lease, as applicable:
>
> (1) A brief description or identification of the leased property;
>
> (2) The amount of any payment by the lessee required at the inception of the lease;

(3) The amount paid or payable by the lessee for official fees, registration, certificate of title, or license fees or taxes;

(4) The amount of other charges payable by the lessee not included in the periodic payments, a description of the charges and that the lessee shall be liable for the differential, if any, between the anticipated fair market value of the leased property and its appraised actual value at the termination of the lease, if the lessee has such liability . . . .

The TILA also authorizes the Federal Reserve Board to promulgate regulations to implement its terms, as follows:

§ 1667f. Regulations

(a) Regulations authorized

(1) In general

The Board shall prescribe regulations to update and clarify the requirements and definitions applicable to lease disclosures and contracts, and any other issues specifically related to consumer leasing, to the extent that the Board determines such actions to be necessary—

(A) to carry out this part;

(B) to prevent any circumvention of this part; or

(C) to facilitate compliance with the requirements of the part.

* * *

(b) Model disclosure

(1) Publication

The Board shall establish and publish model disclosure forms to facilitate compliance with the disclosure requirements of this part and to aid the consumer in understanding the transaction to which the subject disclosure form relates.

The Federal Reserve Board adopted Regulation M pursuant to its statutory authority under the TILA. *See* 12 C.F.R. § 213, *et seq*. It provides in pertinent part as follows:

§ 213.4 Content of disclosures.

For any consumer lease subject to this part, the lessor shall disclose the following information, as applicable:

* * *

(f) *Payment calculation.* In a motor-vehicle lease, a mathematical progression of how the scheduled periodic payment is derived, in a format substantially similar to the applicable model form in appendix A of this part, which shall contain the following:

(1) *Gross capitalized cost.* The gross capitalized cost, including a disclosure of the agreed upon value of the vehicle, a description such as "the agreed upon value of the vehicle [state the amount] and any items you pay for over the lease term (such as service contracts, insurance, and any outstanding prior credit or lease balance)," and a statement of the lessee's option to receive a separate written itemization of the gross capitalized cost. If requested by the lessee, the itemization shall be provided before consummation.

* * *

(6) *Rent charge.* The rent charge, with a description such as "the amount charged in addition to the depreciation and any amortized amounts." This amount is the difference between the total of the base periodic payments over the lease term minus the depreciation and any amortized amounts.

* * *

(10) *Itemization of other charges.* An itemization of any other charges that are part of the periodic payment. . . .

STATEMENT OF THE CASE

A. The Truth in Lending Act and Its Subsequent Amendment by the Consumer Leasing Act.

Congress passed the Truth in Lending Act in 1968, 82 Stat. 148, which "culminated several years of congressional study and debate as to the propriety and usefulness of imposing mandatory disclosure requirements on those who extend credit to consumers in the American market." *Mourning v. Family Publication Serv., Inc.*, 411 U.S. 356, 363 (1973). "Because of the divergent, and at times fraudulent, practices by which consumers were informed of the terms of the credit extended to them, many consumers were prevented from shopping for the best terms available and, at times, were prompted to assume liabilities they could not meet." *Id.*

In the text of the Act itself, Congress stated the key findings that justified the new legislation:

> The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms, so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

15 U.S.C. § 1601. To this end, the House Committee on Banking and Currency reported that "by requiring all creditors to disclose credit information in a uniform manner, . . . the American consumer will be given the information he needs to compare the cost of credit and to make the best informed decision on the use of credit." H.R.Rep. No. 1040, 90th Cong., 1st Sess., 13 (1967).

Because the provisions of the law and the practices in this field are complicated, and the stratagems devised by creditors are almost infinitely various, Congress empowered the Federal Reserve Board "to define such classifications as were reasonably necessary to insure that the objectives of the Act were fulfilled,

no matter what adroit or unscrupulous practices were employed by those extending credit to consumers." *Mourning*, 411 U.S. at 366; *see also Milhollin*, 444 U.S. at 559-60 ("Because of their complexity and variety, however, credit transactions defy exhaustive regulation by a single statute. Congress therefore delegated expansive authority to the Federal Reserve Board to elaborate and expand the legal framework governing commerce in credit.").

In 1976, Congress supplemented the provisions of the TILA by extending its coverage to lease transactions, which were becoming increasingly prevalent among consumers. *See* Consumer Leasing Act, 90 Stat. 259, 15 U.S.C. § 1667 *et seq.* Indeed, this statute was enacted into law as an amendment that constituted a new Chapter 5 of the Truth in Lending Act. *See, e.g.,* Federal Reserve Bd., *Consumer Leasing*, 58 Fed. Reg. 61,035, 61,036 (Nov. 19, 1993); *see also* 15 U.S.C. § 1602(a) (definitions and rules of construction set forth in section 1602 of the TILA are applicable to consumer lease transactions). Hence the terms of this enactment provide for similarly comprehensive disclosures to consumers and once again confer broad rulemaking authority upon the Federal Reserve Board to implement the same objectives with respect to consumer lease transactions that are achieved under the Truth in Lending Act. *See, e.g.*, 15 U.S.C. § 1667a & 1667f. The Board has noted that a "long-term automobile lease is the most common type of consumer lease covered by the Act." 58 Fed. Reg. at 61,036.

B. The Federal Reserve Board's Regulations Adopted to Implement the Statute.

The regulations adopted over the years to carry out the Board's responsibilities in implementing the TILA have uniformly received substantial deference from this Court. *See, e.g., Valencia*, 452 U.S. at 211-23; *Milhollin*, 444 U.S. at 559-69; *Mourning*, 411 U.S. at 363-75.

The Board implemented the consumer lease provisions of the TILA by adopting its Regulation M. *See* 12 C.F.R. Part 213. This Court has specified that the courts have "no ground for displacing the Federal Reserve staff's expert judgment" in

areas not explicitly addressed by the Act. *Milhollin*, 444 U.S. at 570. The Court buttressed this holding by noting that under the provisions of the TILA, "Congress has conferred special status upon official staff interpretations. *See* 15 U.S.C. § 1640(f); 12 CFR § 226.1(d) (1979)." *Milhollin*, 444 U.S. at 566 n.9. The TILA further draws on the Board's expertise by stating that it "shall establish and publish model disclosure forms to facilitate compliance with the disclosure requirements of this part and to aid the consumer in understanding the transaction to which the subject disclosure form relates," which command similar deference from the courts. 15 U.S.C. § 1667f(b)(1). The Federal Reserve staff has issued an Official Staff Commentary that presents the agency's definitive guidance to proper interpretation of Regulation M. *See* 12 C.F.R. Part 213, Supp. I; Federal Reserve Board, *Official Staff Commentary to Regulation M*, 61 Fed. Reg. 52,269 (Oct. 7, 1996).

C. Further Evolution of the Board's Regulations and Its Interpretation of Their Terms.

In 1996, the Federal Reserve Board amended Regulation M to strengthen its requirements and "carry out more effectively the purposes of the Act." Federal Reserve Board, *Regulation M: Final Rule*, 61 Fed. Reg. 52,246, 52,246 (Oct. 7, 1996). In passages not discussed by the court below, the Board presented its Official Staff Commentary to Regulation M, which provided illuminating explanation of how "the revised regulation also requires some new disclosures." *Id.* at 52,274.

Most germane here, the Official Staff Commentary issued by the Board specified that the acquisition fee — also referred to as "lease acquisition charges" — is to be itemized as part of the "gross capitalized cost" of the vehicle:

> There are also requirements for calculating and disclosing certain subtotals. Gross capitalized cost is analogous to gross purchasing price ***including lease acquisition charges***, carried-over balances on any previous transactions, initial taxes owed, registration fees, delivery charges, and any

> after-market products such as extended warranties.

Id. (emphasis added). By contrast, as the Board made clear later in this same passage, the rent charge is something quite distinct from the "gross capitalized cost," representing instead "the lessor's added-on cha[illegible] to cover transaction costs and the charge for capital use, incl[illegible]ng any profit from financing." *Id.* Under the text of Regulation M, therefore, it is improper for a lessor to hide its acquisition fees in the rent charge — which is not required to be itemized — rather than itemizing them in the gross capitalized cost, as the Board explicitly required in these provisions interpreting its own regulations. *See id.*

D. The Course of Proceedings Below.

Petitioner entered into a lease with Ford for a 1998 truck. The lease agreement was on a pre-printed form designed by Ford. On this form, Ford expressly lists the acquisition fee within those charges that should be itemized as part of the gross capitalized cost. Nonetheless, Ford fills in "N/A" in that spot on the leasing forms as a regular practice, thereby wrongly suggesting that it charges no such fee as part of its leasing terms. *See* Complaint ¶¶ 22-24. As a result, prospective lessees had no way of knowing or ascertaining the fact that Ford actually does impose an acquisition fee as part of the cost of the lease, and had no way of knowing or ascertaining the amount of the acquisition fee that would be imposed if they executed such a lease with Ford.

Petitioner brought this class-action suit, alleging that Ford's failure to disclose the acquisition fee in the lease agreement violates federal and state law. Ford moved to dismiss, and the district court issued a final order that granted dismissal of petitioner's claims under the TILA as well as Regulation M. *See* Pet. App. 7a-8a. The district court's final order also dismissed petitioner's claims under Kentucky's consumer protection laws. *See id.* at 8a.

The court of appeals affirmed, holding that the TILA "does not mandate any disclosure of the administrative fee or

itemization of the rent charge." Pet. App. 4a. The court further held that Regulation M does not require disclosure or itemization either, though it never discussed the agency's own interpretation and explanation of the terms of its regulation. In addition, the court embraced the view that the core purpose of these statutory and regulatory provisions is *not* to provide consumers with full and complete information about the relevant calculations that generate the total price, but simply to permit them "to calculate monthly payments prior to signing a lease" and to "comparison shop for a better lease" based only on *total* price. *Id.* at 5a.

A timely petition for rehearing was denied without comment, *see id.* at 17a-18a, and this petition for *certiorari* followed.

REASONS FOR GRANTING THE WRIT

This case centers on Ford Motor Credit Company's representation on all of its consumer lease forms that it does not charge any acquisition fee, when in fact it charges *one of the highest acquisition fees on the market* and conceals it from customers in violation of the Truth in Lending Act. An acquisition fee is an amount that the lessor charges to the lessee for costs associated with acquiring the lease and administering the terms of the lease, and is thus "a type of handling fee." Pet. App. 2a.

These facts place in sharp focus the broader statutory and regulatory issues presented by this petition. The lower court here failed in its duty to read this consumer protection law in light of its remedial objectives to deter "adroit or unscrupulous practices" in credit transactions and to increase "the amount of information available to the consumer." *Mourning*, 411 U.S. at 366-67. Even more pointedly, it refused to defer to the Board's interpretation of its own regulation and to the expert staff commentary explaining the reach and consequences of the disclosures required by its regulation, in direct contradiction of the approach mandated by this Court's decisions. *See, e.g.*, *Valencia*, 452 U.S. at 211-23; *Milhollin*, 444 U.S. at 559-69.

The importance of these issues goes well beyond the leasing transaction at issue in this case. "An automobile lease is the most common type of consumer lease covered by the act. Leases accounted for about one-third of all passenger car deliveries to consumers in 1995." 61 Fed. Reg. at 52,246. Ford alone held more than 800,000 leases nationally in the year 2000. *See* Ford Motor Credit Co., Form 10-K, at 24 (2002). The average gross lease value on Ford's consumer leases was $14,685 in 2001, meaning that the total value of these leasing transactions to Ford was somewhere in excess of ***$11 billion***. *See id.* at 6. Taking into account the same types of transactions effected annually by the other automobile lessors would magnify that number several times over. Moreover, the success of one group of creditors in their "attempt to characterize their transactions so as to fall one step outside whatever boundary Congress attempted to establish" in the Truth in Lending Act, *Mourning*, 411 U.S. at 365, would embolden creditors engaged in other categories of consumer transactions to do the same, with grave effects for the American economy. For all of these reasons, the issues presented in this case merit review.

I. THE SIXTH CIRCUIT'S FAILURE TO DEFER TO THE FEDERAL RESERVE BOARD'S BINDING INTERPRETATION OF ITS OWN REGULATION SQUARELY CONFLICTS WITH PRECEDENTS OF THIS COURT AND OTHER CIRCUITS.

A central issue in this case is whether the TILA and its implementing agency regulations require disclosure of the acquisition fee as a component of the gross capitalized cost. By contrast, Ford has asserted that lessors have the discretion to represent that the acquisition fee is not being charged, and then add it on to the rent charge, which allows Ford to avoid disclosure of the fee since there is no statutory or regulatory requirement that the rent charge be itemized. Here the acquisition fee is not negligible; indeed, Ford appears to charge one of the highest such fees in the marketplace. In this case, for example, it is undisputed that the acquisition fee amounted to $530 on a vehicle with a gross capitalized cost of $22,279 — in

excess of 2%. *See* Complaint ¶¶ 22-24. Ford concedes that it never discloses to consumers that it is charging this fee, but folds it into the rent charge, which is then displayed as a singular amount. Consumers never know and have no way to learn that the amount represented as a rent charge (typically analogous to interest on a loan) is actually the rent charge plus a separate acquisition fee. In short, the acquisition fee as a component of the cost of the lease is not only hidden from prospective lessees, but Ford is representing that the fee is not being charged at all, thereby preventing them from making informed economic decisions among different leasing alternatives.

In its decision below, the court of appeals concluded that the TILA "does not mandate any disclosure of the administrative fee or itemization of the rent charge." Pet. App. 4a. The court also held that no further disclosure or itemization is required by Regulation M, which in its judgment "does not obligate the financing company to itemize the rent charge." *Id.* Yet the court stopped short of examining all the agency materials available to shed light on the proper interpretation of the TILA and Regulation M, and this gap in its analysis led it into error.

In particular, the court below did not take into account the fact that the Federal Reserve Board amended Regulation M in 1996 to strengthen its requirements. In passages not discussed by the court in this case, the agency provided definitive and illuminating explanation of how "the revised regulation also requires some new disclosures." Federal Reserve Board, *Official Staff Commentary to Regulation M*, 61 Fed. Reg. 52,269, 52,274 (Oct. 7, 1996). Most pointedly, the agency made it quite clear that the acquisition fee — also referred to as "lease acquisition charges" — is to be considered a component of the "gross capitalized cost" of the vehicle and thus must be disclosed and itemized:

> There are also requirements for calculating and disclosing certain subtotals. Gross capitalized cost is analogous to gross purchasing price ***including lease acquisition charges***, carried-over balances on any

> previous transactions, initial taxes owed, registration fees, delivery charges, and any after-market products such as extended warranties.

Id. (emphasis added). By contrast, as the agency makes clear later in this same passage, the rent charge is something quite distinct from the "gross capitalized cost," representing "the lessor's added-on charge to cover transaction costs and the charge for capital use, including any profit from financing." *Id.* Thus it is clear from the agency's own discussion and explanation of its Regulation M that it is improper for Ford to hide its acquisition fees in the rent charge — which is not required to be itemized — rather than listing them explicitly as separately itemized items in the gross capitalized cost, as the agency spells out here should be done. *See id.*

A. By Ignoring the Board's Own Definitive Interpretation of Its Regulation, the Sixth Circuit Violated the Court's Mandate that Such Interpretations Merit Broad Deference.

The Sixth Circuit's failure to consider the agency's own definitive interpretation of its regulation, and hence the agency's views in interpreting the laws implemented by Regulation M, squarely undermines its legal conclusions and warrants review here. Clearly the TILA is no more than "silent or ambiguous with respect to the specific issue" of whether the acquisition fee must be disclosed to prospective lessees. *Chevron*, 467 U.S. at 843. In such circumstances, this Court has firmly held that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . and the principle of deference to administrative interpretations has been consistently followed by this Court." *Id.* at 844 (footnote and quotation omitted). The Court has based this approach on its recognition that an agency's power to administer the governing statutes in its substantive area "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

Moreover, it is settled law that when an agency construes its own regulation, deference is "even more clearly in order" than when it construes its enabling statutes. *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *see also Auer*, 519 U.S. at 461 (agency interpretation of its own regulations "is controlling unless plainly erroneous or inconsistent with the regulation") (quotation omitted); *Thomas Jefferson Univ.*, 512 U.S. at 512 (courts "must give substantial deference to an agency's interpretation of its own regulations"); *Robertson v. Methow Valley Citizens Ccl.*, 490 U.S. 332, 359 (1989) (same); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945) (same).

That is precisely the case here. In its recent revisions to Regulation M, the Federal Reserve Board expressly stated that it strengthened the extent of the disclosures that must be made under the TILA. The agency also specified, in the Official Staff Commentary to Regulation M, that it regards acquisition fees as charges that must be disclosed and itemized as part of the "gross capitalized cost" of the vehicle, not folded in as an undisclosed remnant of the rent charge, which is how Ford has mishandled it in the circumstances here. *See* 61 Fed. Reg. at 52,274. Indeed, all of this helps to explain why on Ford's *own leasing forms* the acquisition fee is listed within those charges that should be itemized as part of the gross capitalized cost, even though Ford has taken the extraordinary step of filling in "N/A" in that spot on the leasing forms as a regular practice, thereby wrongly suggesting that it charges no such fee as part of its leasing terms.

The Court has also spoken specifically and emphatically to the issue of whether staff opinions of the Federal Reserve Board should be found to be controlling on the appropriate interpretation of the TILA and of the implementing regulations that the agency administers. In *Milhollin*, the Court expressly held that "[u]nless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive for several reasons." *Id.* at 565. First, as stated above, the Court "has often repeated the general proposition that considerable respect is due 'the interpretation given a statute by the officers or agency charged with its

administration.'" *Id.* at 566 (quotation omitted). Second, Congress has "specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of [the consumer protection] law." *Id.* Third, deference to the agency "is compelled by necessity," since "a court that tries to chart a true course to the Act's purpose embarks on a voyage without a compass when it disregards the agency's views." *Id.* at 568.

Because the TILA gives the Board and its staff such unusually "broad administrative lawmaking power," *Milhollin*, 444 U.S. at 566, this Court has noted that Congress has stated its decisive "preference for resolving interpretive issues [under the TILA] by uniform administrative decision, rather than piecemeal through litigation," in order to produce the "coherent and predictable body of administrative rules" demanded by this complex statute. *Id.* at 568 & n.12. Indeed, in *Milhollin*, this Court squarely held that the Federal Reserve Board and its staff must be treated as one and the same for purposes of affording judicial deference:

> But to the extent that deference to administrative views is bottomed on respect for agency expertise, it is unrealistic to draw a radical distinction between opinions issued under the imprimatur of the Board and those submitted as official staff memoranda. . . . At any rate, it is unnecessary to explore the Board/staff difference at length, because Congress has conferred special status upon official staff interpretations. *See* 15 U.S.C. § 1640(f); 12 C.F.R. § 226.1(d) (1979).

Id. at 566 n.9. Accordingly, "judges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not irrational" under the provisions of the TILA. *Id.* at 568. The Court subsequently reaffirmed the same directive that courts must defer to the Board's authority in *Valencia*, a case that converges toward the facts at issue in this case, since it involved

the disclosures required on an installment contract to purchase an automobile: "as we so plainly recognized in [*Milhollin*,] absent some obvious repugnance to the statute, the Board's regulation implementing this legislation should be accepted by the courts, as should the Board's interpretation of its own regulation." *Valencia*, 452 U.S. at 219.

Thus here, as in *Chevron* and *Milhollin*, "the Court of Appeals misconceived the nature of its role in reviewing the regulations at issue." *Chevron*, 467 U.S. at 845. *See also United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001). Once the Court has discerned that Congress did not speak specifically in the TILA to whether a lessor must disclose or itemize the acquisition fee, the only remaining issue is whether the agency's own views on that subject are merely "reasonable" — and if so, they must be upheld. *Id.*

B. The Sixth Circuit's Approach Is in Stark Conflict with the Deference that the Other Circuit Courts Uniformly Give to the Board.

Unlike the Sixth Circuit in this case (and in the *Pfennig* case, discussed *infra*), the other lower courts have faithfully adhered to this Court's holdings in *Milhollin* and *Valencia* in cases applying the TILA and its implementing regulations. Because the tenor of this Court's decisions about the proper relationship between the Federal Reserve Board and the courts in construing these laws is so clear, it is not surprising that the lower courts generally have had no trouble applying that approach in cases involving various consumer credit issues. What is surprising, instead, is that the Sixth Circuit would depart so sharply from the Court's teachings in this area.

In *Benion v. Bank One*, 144 F.3d 1056 (7th Cir.), *cert. denied*, 525 U.S. 963 (1998), for example, the court of appeals confronted an issue of how to categorize certain credit transactions under the TILA. The court addressed the issue by looking carefully at the Board's governing regulation and at the Official Staff Commentary on it, "which also has the status of a regulation." *Id.* at 1057-58 (citing *Milhollin*). In the end, the court determined that the defendant bank had the better of the

argument because the plaintiff was asking the court in effect to issue a regulation that the Board had declined to adopt. In the key passage, the court observed that "[w]hen an activity of a technical and specialized character is comprehensively regulated by an expert agency, as consumer credit disclosures are comprehensively regulated by the Federal Reserve Board (and no one doubts that this particular agency is a repository of genuine expertise), courts should generally leave the plugging of loopholes to the agency, lest the court's reparative efforts create confusion and disrupt the regulatory scheme." *Id.* at 1059 (citing *Milhollin*).

The principle of deference is an evenhanded one, which does not always favor either plaintiff or defendant. In *Riviere v. Banner Chevrolet, Inc.*, 184 F.3d 457 (5th Cir. 1999), for example, the essential issue was whether a motor vehicle dealer was acting as a "creditor" within the meaning of the TILA. The plaintiff contended that the district court had erred by rejecting the Federal Reserve Board's official staff commentary bearing on this point, and the court of appeals agreed. As it stated: "When it enacted TILA, Congress 'delegated expansive authority to the Federal Reserve Board to elaborate and expand the legal framework governing commerce in credit.'" *Id.* at 460 (quoting *Milhollin*). Because the Board's staff commentary had clarified the issue, under Milhollin it must be regarded as "decisive" unless it were shown to be "demonstrably irrational," which the court judged it was not. Id. at 461 (citing *Milhollin*).

The same approach has been employed routinely by the other circuits. In *Ortiz v. Rental Mgmt., Inc.*, 65 F.3d 335 (3d Cir. 1995), the question was whether rent-to-own agreements terminable at any time fell within the purview of the TILA. The court determined that "there was a gap in the statute," *id.* at 340, and recognized that, under this Court's decisions in *Mourning* and *Milhollin*, the Board has exceptionally "broad power" to decide such issues, and its determinations thus are due great deference; hence the Board's regulation was taken as controlling. *Id.* at 340-41. In *Sentinel Fed. Savings & Loan Ass'n v. Office of Thrift Supervision*, 946 F.2d 85 (8th Cir. 1991), the issue once again involved the respect that a court

must afford to the Official Staff Commentary interpreting the Board's own regulations. In that case, the intricate issue was whether a savings and loan association was obliged to disclose its composite annual percentage rates. The court decided that question by resting on the Board's staff commentary treating the issue, declaring that "[t]hese Supreme Court cases make it abundantly clear that Sentinel's attack on the validity of the Official Staff Commentary must fail unless Sentinel can show that the composite annual percentage rate disclosure requirement was 'demonstrably irrational.'" *Id.* at 89 (quoting *Milhollin* and *Valencia*). *See also Consumers Union of U.S., Inc. v. Federal Reserve Bd.*, 938 F.2d 266, 270 (D.C. Cir. 1991) (upholding Federal Reserve Board regulations against challenge brought by consumer group because "what constitutes meaningful disclosure under TILA" is "exactly the sort of Board determination" to which courts "must grant a great deference in the absence of an explicit statutory command") (citing *Milhollin*).

In this case, however, the court below departed from this uniform line of circuit authority and did not even discuss the agency's own position on the effects of its regulation, let alone afford it the deference that is properly due as a matter of controlling law. *See, e.g., Milhollin*, 444 U.S. at 565-68; *Valencia*, 452 U.S. at 219-223. As described earlier, the court failed to defer to — or even to mention — the Official Staff Commentary to Regulation M, which plainly includes acquisition fees among the components of "gross capitalized cost" that must be itemized for consumers. *See* 61 Fed. Reg. at 52,274. This crucial omission — which affects millions of consumer lease transactions for automobiles nationally — warrants the Court's review here and ultimately its reversal of the decision below in this case.

In addition, this case illustrates a pattern on the part of the Sixth Circuit of failure to defer to the Federal Reserve Board in cases involving the application of the Truth in Lending Act. Indeed, the Court has just granted a writ of *certiorari* on a closely analogous issue in *Household Credit Serv., Inc. v. Pfennig*, U.S. No. 02-857 (cert. granted June 27, 2003). In that

case, the question presented is whether the Sixth Circuit improperly substituted its interpretation of the TILA for that of the Federal Reserve Board, thereby effectively invalidating a regulation that affects tens of millions of consumer credit card arrangements. *See id.* Here, likewise, the issue is whether the same court improperly substituted its interpretation of the TILA's provisions governing consumer leases for that of the Board, thus sharply undermining the effects of a regulation that affects billions of dollars of automobile leases each year.[2]

II. THE COURT EVISCERATED THE TRUTH IN LENDING ACT BY HOLDING THAT THE LAW AND ITS IMPLEMENTING REGULATIONS DO NOT BAR RESPONDENT FROM REPRESENTING ON EVERY LEASE THAT IT IS NOT CHARGING AN ACQUISITION FEE WHEN IT ACTUALLY CHARGES EACH CONSUMER A LARGE FEE.

The court below held that none of the federal statutes or regulations that were enacted to protect consumers should be read to require disclosure of the acquisition fees at issue in this case. *See* Pet. App. 4a-5a. In reaching this conclusion, the court embraced the view that the core purpose of these provisions is *not* to provide consumers with full and complete

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[2] Given the sheer magnitude of the consumer leasing transactions at issue in this case, as well as the fundamental questions raised about the efficacy of the Federal Reserve Board's regulatory authority to protect consumers in the wake of the ruling below, one precautionary alternative would be for the Court to call for the views of the Solicitor General here, just as it did in the *Pfennig* case. In *Pfennig*, the Solicitor General stated that "[u]nder this Court's precedents, the court of appeals should have deferred to the Board's reasonable regulation," and noted that the settled principle of judicial deference "has heightened force in the context of regulations issued by the Board under TILA." Brief for the U.S. as Amicus Curiae at 10, *Household Credit Serv., Inc. v. Pfennig*, U.S. No. 02-857 (brief filed at the petition stage). Thus the Solicitor General urged the Court to grant certiorari in *Pfennig* and correct a decision that was bluntly described as "wrong." *Id.* at 1.

information about the relevant calculations that generate the total price of a consumer lease, but simply to permit them "to calculate monthly payments prior to signing a lease" and to "comparison shop for a better lease" based only on *total* price. *Id.* at 6. This approach is quite out of harmony with the core purposes of the TILA, which was adopted as a "remedial measure" for the benefit of consumers, and thus should be liberally construed to that end. *Mourning*, 411 U.S. at 371. *Cf. Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994) ("We have liberally construed FELA to further Congress' remedial goal."); *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982) (construing antitrust laws in light of Congress' "expansive remedial purpose" to protect and benefit consumers); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (in construing the Securities Exchange Act, "we are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes"); *United States v. One Ford Coach*, 307 U.S. 219, 226 (1939) (as a "remedial measure," federal forfeiture statute must be "liberally construed to carry out the objective").

Numerous other circuits have taken just such a generous view in interpreting the provisions of the TILA over the years. *See, e.g.*, *Carmichael v. Nissan Motor Acceptance Corp.*, 291 F.3d 1278, 1280 (11th Cir. 2002) (TILA is a consumer protection statute which is remedial in nature and therefore must be construed liberally in order to best serve Congress' intent) (quotation omitted); *Ramadan v. Chase Manhattan Corp.*, 156 F.3d 499, 502 (3d Cir. 1998) (same); *Bizier v. Globe Financial Serv., Inc.*, 654 F.2d 1, 3 (1st Cir. 1981) (same); *James v. Home Constr. Co. of Mobile, Inc.*, 621 F.2d 727, 729 (5th Cir. 1980) (same); *Eby v. Reb Realty, Inc.*, 495 F.2d 646, 650 (9th Cir. 1974) (same); *N.C. Freed Co., Inc. v. Board of Governors of Fed. Reserve Syst.*, 473 F.2d 1210, 1214 (2d Cir.) (same), *cert. denied*, 414 U.S. 827 (1973).

If comparison-shopping based only on bottom-line prices were sufficient to satisfy the provisions of the TILA and its implementing regulations, they would serve little or no purpose. The *central mandate* of these statutory and regulatory

provisions is instead to unpack the components of the bottom-line price so that consumers can compare more directly how different lessors and vendors treat such items as rent charges, acquisition fees, and the like. These measures are especially designed to benefit the average consumer, who is largely unfamiliar with the pricing structure of all the arcane financial components of motor vehicle leases. As the Seventh Circuit has formulated the proper inquiry, the courts must "view the sufficiency of TILA-mandated disclosures from the standpoint of an ordinary consumer, not the perspective of a Federal Reserve Board member, federal judge, or English professor" and thus determine whether "the TILA disclosures were clear and conspicuous to an ordinary consumer." *Lifanda v. Elmhurst Dodge, Inc.*, 237 F.3d 803, 806 (7th Cir. 2001) (quotation, citations, and ellipses omitted); *see also Applebaum v. Nissan Motor Acceptance Corp.*, 226 F.3d 214, 217-223 (3d Cir. 2000) (TILA and Regulation M were violated where disclosures were judged to be "incomprehensible" to the average consumer), *cert. denied*, 533 U.S. 929 (2001); *Lundquist v. Security Pacific Auto. Fin. Serv. Corp.*, 993 F.2d 11, 15 (2d Cir.) (disclosures in automobile lease held to violate the TILA because they were not "reasonably understandable"), *cert. denied*, 510 U.S. 959 (1993). No such determination was ever undertaken in this case.

The core remedial purpose of the federal consumer protection laws would be ill served by a holding that no legal violation occurs simply because the complaining parties ultimately know the bottom-line price they will have to pay to lease the vehicle and can comparison-shop that price against other vehicles elsewhere. Indeed, on that theory, all of the laws and regulations that are designed to protect consumers by ensuring them access to more complete and more accurate information would be rendered a nullity, since the provisions of the TILA are utterly unnecessary to aid consumers who only wish to compare *total* price. It is thus apparent that the reasoning and result in this case cannot be squared with cases like *Milhollin* and *Mourning*, or with the circuit decisions cited above. As the Court pointedly concluded in *Mourning*:

> That the approach taken may reflect what respondent views as an undue paternalistic concern for the consumer is beside the point. The statutory scheme is within the power granted to Congress under the Commerce Clause. It is not a function of the courts to speculate as to whether the statute is unwise or whether the evils sought to be remedied could better have been regulated in some other manner.

411 U.S. at 377-78. The same is true here, and the court below plainly erred when it misread the TILA and ignored the Board's later amendments to Regulation M. In consequence, the Sixth Circuit improperly overrode the definitive agency staff interpretation of the Board's own controlling regulations implementing these statutes.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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July 2003

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APPENDIX A

United States Court of Appeals,
Sixth Circuit.

William P. SCHLENK,
Plaintiff-Appellant,
v.
FORD MOTOR CREDIT COMPANY,
Defendant-Appellee.

No. 01-5434.

Argued: Aug. 7, 2002.
Decided and Filed: Oct. 25, 2002.
Rehearing and Suggestion for Rehearing En Banc
Denied Feb 11, 2003.

Before: SUHRHEINRICH and BATCHELDER, Circuit Judges; LITTLE, District Judge.*

OPINION

F.A. LITTLE, JR., District Judge.

Today we consider an appeal by William P. Schlenk from the district court's order granting Ford Motor Credit Company's ("FMCC") motion to dismiss. The district court granted FMCC's motion to dismiss Schlenk's claims under the Consumer Leasing Act and the Kentucky Consumer Protection Act. The district court also dismissed a deceptive advertising claim and, thereby, terminated the case.

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* The Honorable F.A. Little, Jr., United States District Judge for the Western District of Louisiana, sitting by designation.

For the following reasons, we AFFIRM the district court's decision.

I. BACKGROUND

A. *Statement of Facts*

Schlenk entered into a vehicle lease agreement with Bill Collins Ford, Inc. A lease agreement, like a purchase agreement, is negotiable and subject to statutory regulation, as we shall later discuss. Here, Schlenk negotiated a lease for a new truck having a total value of $22,279. The dealer assigned the lease to FMCC. In order to calculate Schlenk's monthly payments, FMCC subtracted the value of the vehicle Schlenk traded and the agreed upon residual value of the truck from the total price, leaving an amount of $3249.70. FMCC then added the rent charge of $3562.22, for a total of $6811.92. To calculate the monthly payment, FMCC divided $6811.92 by 24, the number of months of the two-year lease term. After sales tax, the monthly lease payments for Schlenk's vehicle amounted to $300.86.

At issue in this case is a $530 administrative fee that is included in the $3562.22 rent charge. The administrative fee is a type of handling fee that FMCC charges to process the lease. FMCC calculates the rent charge by taking 1/9th of 1% of the vehicle's net capitalized cost multiplied by the term of the lease. FMCC collects the fee on a pro rata basis each month. This case does not involve the amount of the fee or the fact that FMCC charged Schlenk an administrative fee. This dispute involves what level of itemization FMCC must disclose by law in regards to the administrative fees and rent charge.

B. *Procedural History*

Schlenk initiated a class action complaint in the United States District Court, Western District of Kentucky, seeking damages and injunctive relief based on federal and state statutes. Schlenk alleged FMCC's practice of including the administrative fee under the heading "rent charge" violated

Consumer Leasing Act ("CLA"), 15 U.S.C. § 1667, *et seq.*, its implementing regulation Federal Reserve Board Regulation M ("Regulation M"), 12 C.F.R. § 213, *et seq.* and the Kentucky Consumer Protection Act ("KCPA"), K.R.S. 367.170, *et seq.* No class was certified.

FMCC moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court granted FMCC's motion to dismiss the CLA claims and the KCPA failure to disclose claim but retained the KCPA deceptive advertising claim. The district court later concluded the deceptive advertising prong was premised on the same statutory violations previously dismissed. The district court concluded that both of Schlenk's causes of action turned on FMCC's compliance, or lack of compliance, with Regulation M. Having decided that FMCC met the disclosure requirements of Regulation M, the district court terminated the case. Schlenk filed a timely appeal.

II. JURISDICTION

The district court had jurisdiction over the action pursuant to 28 U.S.C. § 1331 as Schlenk filed a claim arising under a federal statute, CLA, 15 U.S.C. § 1667, *et seq.* The district court had supplemental jurisdiction of Schlenk's state law claims under 28 U.S.C. § 1367. This court has jurisdiction to hear the appeal pursuant to 28 U.S.C. § 1291.

III. ANALYSIS

A. *Standard of Review*

We review de novo a district court's dismissal of a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *See United Food & Commercial Workers Int'l Union Local 911 v. United Food & Commercial Workers Int'l Union*, 301 F.3d 468, 472 (6th Cir.2002) (citing *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 619 (6th Cir.2002)). In doing so, we "accept all well-pleaded factual allegations of the complaint as true and

construe the complaint in the light most favorable to the plaintiff." *Id.*

B. *Federal Statutes Do Not Require an Itemization of the Rent Charge.*

Schlenk denies that this case turns on whether the federal statutes require itemization of the rent charge. Schlenk wants the court to decide the case based on "whether items which are required to be disclosed as part of the capitalized cost of a lease can be added to the rent charge to avoid the CLA's disclosure requirement." (Final Reply Br. of Appellants at 2). Appellant's framing of the issue begs the question. If we were to agree with this interpretation of the issue, we would first have to assume that the statutes require disclosure of the administrative fee separate from including it under the rent charge. Such an assumption necessarily decides the case. We view the issue as whether the CLA and Regulation M require FMCC to disclose the administrative fees to the consumer by itemizing the fees separate from the rent charge.

On the face of the statute, the CLA does not mandate any disclosure of the administrative fee or itemization of the rent charge. Under section 1667a Consumer Lease Disclosures, the statute lists information that the lessor should provide to the lessee "in a clear and conspicuous manner." 15 U.S.C. § 1667a. The list of required disclosures does not include administrative fees or the rent charge. We turn to Regulation M to find support for Appellant's claims. Regulation M provides a list of disclosures for consumer leases. 12 C.F.R. § 213.4. Regulation M specifically mentions "rent charge." The regulation describes rent charge as "'the amount charged in addition to the depreciation and any amortized amounts.' This amount is the difference between the total of the base periodic payments over the lease term minus the depreciation and any amortized amounts." 12 C.F.R. § 213.4(f)(6). Regulation M requires that the payment calculation contain the rent charge, but section 213.4(f)(6) does not obligate the financing company to itemize the rent charge.

To support his claim, Schlenk cites 12 C.F.R. § 213.4(f)(10). Section 213.4(f)(10) requires "[a]n itemization of any other charges that are part of the periodic payment." We do not agree with Appellant that the rent charge falls under the heading "other charges" and, thus, requires itemization. The term rent charge is specifically mentioned earlier in the regulation in section 213.4(f)(6). We agree with the district court's assertion that "[t]he word 'other' indicates that the itemization mandated by 12 C.F.R. § 213.4(f)(10) only applies to charges that were not specifically discussed earlier in the regulation." *Schlenk v. Ford Motor Credit Co.*, No. 3:99-CV0725-H (W.D. Ky. Aug. 7, 2000). Therefore, neither the CLA nor Regulation M requires FMCC to disclose the administrative fees and itemize the rent charge.

Schlenk argues further that without such an itemization of the rent charge, financing companies would have free reign to conceal other fees under the heading rent charge, and, thus, deceive consumers by charging higher amounts. We do not agree with such a prediction. The statutes require financing companies to disclose the amount of the rent charge to potential lessees. Such disclosure allows consumers to calculate monthly payments prior to signing a lease. Armed with this knowledge, consumers can negotiate the rent charge to lower overall monthly payments or simply comparison shop for a better lease. Either way, an itemization of the rent charge does not necessarily affect the lessee's ability to receive a fair deal.

C. *State Law Claims Were Correctly Dismissed.*

Appellant brings state claims under the Kentucky Consumer Protection Act ("KCPA"), K.R.S. 367.170, *et seq.* The KCPA states that "[u]nfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." K.R.S. § 367.170. Section 367.220(1) requires "ascertainable loss of money or property, real or personal" for actions brought under KCPA violations. Here Schlenk has failed to show any loss suffered as a result of FMCC not itemizing the rent charge. After concluding that the

FMCC's disclosures were sufficient under the statutory requirements, we fail to see any "deceptive acts or practices" triggering the KCPA. We agree with the district court's dismissal of the state law claims.

IV. CONCLUSION

For the forgoing reasons, we AFFIRM the district court's order to dismiss all of the Appellant's causes of action.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:99-CV-725-H

WILLIAM P. SCHLENK, ET AL. **PLAINTIFFS**

v.

FORD MOTOR CREDIT COMPANY **DEFENDANT**

MEMORANDUM AND ORDER

Occasioned by Plaintiff's request to certify an interlocutory appeal, the Court once again reviewed the legal arguments central to this case as well as its procedural status.

This case concerns the method by which Defendant must disclose and account for a $530 administrative fee in its automobile lease. Defendant included the fee within the $3,562.22 "rent charge" as used in the lease and as Defendant says it is defined by 12 C.F.R. § 213.4(f)(6). Plaintiff says that the $530 should be separately itemized under § 213.4(f)(10). This dispute does not affect the amount which the consumer would pay under the lease, irregardless of the method by which the charge is included.

The Court appreciates the arguments on each side and the skill exhibited by each counsel in making those arguments. Each side is inhibited in their arguments only by the generality of Regulation M. After another review, the Court continues to believe that Regulation M is satisfied by the inclusion of Defendant's administrative fee under "rent charges." Regulation

M does not seem to require itemization under § 213.4(f)(10).

During the discussions with counsel, it became apparent that Plaintiff's deceptive advertising claim is premised upon the same statutory violation which the Court has already decided. Consequently, it seems fruitless to litigate the deceptive advertising claim when the Court has found no statutory violation. In view of the Court's rulings with respect to Regulation M, neither counsel seems to believe that it was necessary to have further briefing on the viability of the remaining deceptive advertising claims. In any event, the legal issue which is paramount in both causes of action concerns Defendant's compliance or lack of compliance with Regulation M. The Court has decided that as a legal matter.

Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Plaintiff's deceptive advertising claim is DISMISSED WITH PREJUDICE. Consequently, the Court has now dismissed all Plaintiff's causes of action.

IT IS FURTHER ORDERED that Plaintiff's motion for leave to file an interlocutory appeal is now MOOT.

This is a final and appealable order.

This 9th day of March, 2000.

/s/
JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:99-CV-725-H

WILLIAM P. SCHLENK, ET AL. **PLAINTIFFS**

v.

FORD MOTOR CREDIT COMPANY **DEFENDANT**

MEMORANDUM AND ORDER

Plaintiff has moved this Court to reconsider its Memorandum and Order entered August 7, 2000 dismissing Plaintiff's claim under the Consumer Leasing Act, 15 U.S.C. § 1667, and Regulation M, 12 C.F.R. § 213. Plaintiff also seeks to amend his complaint. The Court set forth the facts underlying this discussion in its prior opinion and will not recite them here. Both of Plaintiff's motions rest on the contention that Defendant amortizes its administrative fee. If Defendant amortizes the administrative fee, Plaintiff claims, then Regulation M requires Defendant to disclose the administrative fee in an itemized list and rather than including it in the rent charge. Because both Plaintiff's motions rest on the same legal contention and must clear the same legal hurdle, this Court just considers the motion to amend but the conclusions apply with equal force to both motions.

Plaintiff may amend his pleading only by leave of the court; such leave, however, "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Though freely given under the proper circumstances, leave to amend a complaint will be denied

for valid reasons, including "futility of the amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Crawford v. Roane*, 53 F.3d 750, 753 (6th Cir. 1995).

A proposed amendment to a complaint is futile if the amended pleading could not withstand a motion to dismiss for failure to state a claim upon which relief may be granted. *See United States v. Wood*, 877 F.2d 453, 456 (6th Cir. 1989). Therefore, the Court should grant Plaintiff leave to amend his complaint unless, construing all factual allegations in the proposed complaint as true and resolving all factual questions in his favor, the amended claim fails as a matter of law. *See Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 156 (6th Cir. 1983).

Plaintiff seeks to amend the complaint with, in essence, a legal conclusion that Defendant amortized the administrative fee. Defendant does not dispute that they charged an administrative fee and included it in each month's lease payment. It just disagrees with the legal significance of that action. If this fee was amortized, Plaintiff claims, then it could not properly be included in the amount under 12 C.F.R. § 213.4(f)(6) ("Rent charge"), but rather should have been itemized as an "other charge" under § 213.4(f)(10) ("Itemization of other charges").

The Court has once again tried to gain some understanding of Regulation M and related provisions. The Court's most recent efforts have not resulted in a change of mind. Whether or not Defendant amortized the administrative fee does not alter the analysis under Regulation M. Regulation M sets up a "mathematical progression" that shows "how the scheduled periodic payment is derived." 12 C.F.R. § 213.4(f). In this progression, the amount identified at each step depends on the amount identified at the prior step. As such, the terms cannot be read in a vacuum and must be analyzed in the proper context.

Plaintiff claims that no amortized amounts can be included in the "Rent charge" because the "Rent charge" is defined as "the difference between the total of the base periodic payments

over the lease term minus the depreciation and any amortized amounts." 12 C.F.R. § 213.4(f)(6). If any amortized amounts are subtracted, Plaintiff argues, then no amortized amounts can be included in the rent charge. However, section 213.4(f)(5) defines the term "Depreciation and any amortized amounts" as merely "the difference between the adjusted capitalized cost and the residual value." 12 C.F.R. § 213.4(f)(5). Other amortized amounts, such as an amortized administrative fee, that are not included in the adjusted capitalized cost do not fit within the definition of section 213.4(f)(5). Even if Defendant amortized its fee, therefore, Regulation M does not require itemized disclosure.

Regulation M, read as a whole, precludes Plaintiff's claim that the administrative fee was amortized. If all payments spread out equally over the term of the lease are amortized amounts, then the rent charge would always be zero. Under Plaintiff's argument, the rent charge cannot include any amortized amount. Any payment spread out equally over the term of the lease is an amortized amount according to Plaintiff's argument. Such a reading would render section 213.4(f)(6) mere surplusage. Thus, Plaintiff's claim that Defendant amortizes the administrative fee cannot be reconciled with the plain language of Regulation M. Even if Defendant amortized the administrative fee, Regulation M does not require itemization of the fee.

The Court appreciates the efforts of both sides in trying to describe the statute and its attendant regulations. Nevertheless, Plaintiff's amended complaint fails as a matter of law with regard to its Consumer Leasing Act claims. To allow the amendment would be futile. Since Plaintiff's motion to reconsider also rests upon the amortization of the administrative fee it, too, will also be denied.

Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Plaintiff's motion to amend and motion to reconsider are both DENIED.

This 30th day of November, 2000.

/s/
JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:99-CV-725-H

WILLIAM P. SCHLENK, ET AL. **PLAINTIFFS**

v.

FORD MOTOR CREDIT COMPANY **DEFENDANT**

MEMORANDUM OPINION

This case involves the rent charge in an automobile lease agreement. Plaintiff is suing Defendant, Ford Motor Credit Company ("Ford"), for failing to itemize the components of its rent charge as required by the Consumer Leasing Act ("CLA"), 15 U.S.C. § 1667 *et seq.* and the Federal Reserve Board Regulation M, 12 C.F.R. § 213, *et seq.* Plaintiff also claims that Defendant's actions constitute a misleading or deceptive trade practice in violation of the Kentucky Consumer Protection Act, K.R.S. 367.170, *et seq.* Defendant denies that it violated these statutes and moves to dismiss Plaintiff's complaint.

In deciding a 12(b)(6) motion, the Court must accept as true all factual allegations made in the complaint. *See Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987). The Court should not grant a Rule 12(b)(6) motion to dismiss unless it is convinced "beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 46 (1957); *see also Nishiyama v. Dixon County, Tenn.*, 814 F.2d 277, 279 (6th Cir. 1987). Relying on this standard of review, the Court examines each allegation in turn.

Relying on Plaintiff's version of the facts, this complaint arises from a lease agreement that Plaintiff entered with Ford on August 7, 1998.[1] The lease agreement contained a disclosure space for an "acquisition fee."[2] Ford marked that space "N/A," not applicable. Ford then collected an undisclosed administrative fee through the "rent charge" included in each monthly lease payment. In Plaintiff's case, this administrative fee was approximately $530. Ford's undisclosed administrative fees are higher than other automobile dealers' disclosed fees. Despite this fact, Ford advertises that it saves Kentucky consumers money because it does not charge up-front fees.

I.

Plaintiff argues that Defendant violated 15 U.S.C. § 1667 and Regulation M, 12 C.F.R. § 213 by failing to (1) itemize the administrative fee charged as part of the periodic payment, as required by 12 C.F.R. § 213.4(f)(10); (2) make required disclosures clearly and conspicuously in writing, as required by 15 U.S.C. § 1667a; and (3) provide the required disclosures prior to consummation of the lease transaction, as required by 15 U.S.C. § 1667a. Defendant counters that the CLA does not require that Plaintiff be given a breakdown of the disclosed "rent charge" on a lease, and because there is no duty to itemize, Defendant did not violate the law by failing to itemize in writing or prior to signing the lease.

The CLA itself clearly does not require an itemization of the "rent charge." *See* 15 U.S.C. § 1667a (specifying required disclosures). Therefore, Plaintiff bases his claim on 12 C.F.R. § 213.4(f)(10). This regulation does not appear to mandate a breakdown of the rent charge either. 12 C.F.R. § 213.4(f) lists required disclosures and definitions for specific parts of the

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[1] Plaintiff also proposes to represent a class of similarly situated consumers in Kentucky.

[2] The acquisition fee is also referred to as an administrative fee.

periodic payment, including the rent charge.[3] Then, after addressing these basic components individually, it requires an itemization of any "other charges" that are part of the periodic payment. The word "other" indicates that the itemization mandated by 12 C.F.R. § 213.4(f)(10) only applies to charges that were not specifically discussed earlier in the regulation. Thus, the Court concludes that the rent charge need not be itemized.

II.

Plaintiff contends that even if this interpretation is correct, Defendant has lumped other fees into the rent charge that are not properly included there. Plaintiff points out that the rent charge is defined as the amount charged *in addition* to amortized amounts. Plaintiff also argues that rent is usually defined as consideration paid for use of property, not as a fee for administration. Finally, Plaintiff claims that the fact that the rent charge is singular rather than plural (rent charges) indicates that it is a single amount, not a sum of amounts. Ford calculates its administrative fee separately from the rest of the rent charge, creating rent charges not envisioned by the regulation.

Defendant responds that the administrative fee is not amortized, rather an equal sum is charged each month.[4] With

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[3] Specifically, with regard to the rent charge it reads: "Rent charge. The rent charge, with a description such as 'the amount charged in addition to the depreciation and any amortized amounts.' This amount is the difference between the total of the base periodic payments over the lease term minus the depreciation of any unamortized amounts." 12 C.F.R. § 213.4(f)(6). Ford uses the recommended definition to describe its rent charge in the lease agreement.

[4] The Court does not consider whether or not Ford amortizes its administrative fee a factual dispute between the parties. Plaintiff never made any allegations about amortization in its complaint. Moreover, Plaintiff expressly states that its belief that Ford amortizes the administrative fee is based on statements by Defendant. The Court has

regard to Plaintiff's other arguments, Defendant dismisses them by arguing that they lack any textual support or legal authority. The regulations do not define rent charge beyond "the amount charged in addition to depreciation and any amortized amounts," a definition Ford claims to meet, and Plaintiff cites no authority to support his interpretation. As the law stands, Defendant claims that dealers can charge as high a rent charge as competition will allow. This poses no problem, Ford says, because the automobile market is very competitive and the lessor is fully aware that any amount included in the rent charge is not part of the value of the car but rather goes to the dealer for conducting the transaction. The rent charge, like the price of the vehicle itself, is negotiable. While the size of the rent charge may be important, Ford's internal breakdown of the rent charge is pretty much irrelevant to the lessor.

The Court is inclined to agree with Defendant. The regulation places few if any limits on what can be included in the rent charge, and the consumer should be aware that the rent charge is a negotiable payment that benefits the dealer. Whether the rent charge is itemized or not, the lease agreement makes clear that the entire amount is in addition to the value of the car and any depreciation. Moreover, 12 C.F.R. § 213.4(f)(6) could have required itemization of the rent charge upon request as it requires of the gross capitalized cost in 12 C.F.R. § 213.4(f)(1) but does not do so. The Court will not read an additional requirement into the regulation which the text neither states nor implies.

III.

Plaintiff also claims that Defendant violated the Kentucky Consumer Protection Act ("KCPA"), K.R.S. 367.170, by intentionally concealing administrative fees and representing that these fees were not charged. In response, Defendant challenges Plaintiff's standing. Defendant argues that Plaintiff does not

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read the statements Plaintiff cites and concludes that Plaintiff misinterpreted them.

allege that he saw any advertisements or that any representations were made to him regarding the administrative fee. Defendant also claims that Plaintiff's failure to disclose claim fails as a matter of law because Ford had no duty to make further disclosures under the facts alleged.

The Court finds that Plaintiff has standing to proceed on his deceptive advertising campaign. The Kentucky Court of Appeals has said that to maintain a claim under the KCPA does not require proof of actual deception. *See Telcom. Directories, Inc. v. Commonwealth*, 833 S.W.2d 848, 850 (Ky. Ct. App. 1991). The Kentucky appellate court offered no elaboration beyond this rather sparse statement, though it certainly appears to be correct as to an action by the state Attorney General seeking injunctive relief. The Court will accept this view as it applies to the limited issue of standing.

Ultimately, a lot more is required to sustain a KCPA claim. KCPA requires that the person bringing the suit suffer "ascertainable loss . . . as a result of an . . . act or practice declared unlawful by K.R.S. 367.170." *See* K.R.S. 367.220. While the KCPA may not require deception, it does require causation and injury. Plaintiff has alleged that Ford advertised that it saved customers money by not charging an administrative fee, when in actuality, Ford charged a higher fee than its competitors. Thus, Plaintiff has alleged an unlawful act and an actual loss. These allegations are sufficient to survive a motion to dismiss on the deceptive advertising claim. It remains to be seen whether Plaintiff can survive the more searching factual and causational inquiry at summary judgment or trial.

Plaintiff's failure to disclose claim, however, must be dismissed because the Court has determined that Defendant had no duty to disclose an itemization of the rent charge.

The Court will enter an order consistent with this Memorandum Opinion.

/s/
JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

APPENDIX E

No. 01-5434

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM P. SCHLENK,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
FORD MOTOR CREDIT COMPANY,	)
	)
Defendant-Appellee.	)

Before: SUHRHEINRICH and BATCHELDER, Circuit Judges; LITTLE, District Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

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* The Honorable F.A. Little, Jr., United States District Judge for the Western District of Louisiana, sitting by designation.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

May 6, 2003

Mr. Richard A. Cordray
4900 Grove City Road
Grove City, Ohio 43123

Re: William P. Schlenk
v. Ford Motor Credit Company
Application No. 02A938

Dear Mr. Cordray:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on May 6, 2003, extended the time to and including July 11, 2003.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By

/s/ Sandra Elliott Spagnolo
Assistant Clerk